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IN THE
COURT OF APPEALS OF INDIANA

RODNEY STRONG,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 15A01-0606-CR-260
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DEARBORN SUPERIOR COURT
The Honorable G. Michael Witte, Judge
Cause No. 15D01-0507-FD-240

March 30, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

Rodney Strong appeals his convictions of operating a vehicle while intoxicated ("OWI") with a prior OWI conviction as a Class D felony,[1] operating while suspended with prior conviction as a Class A misdemeanor,[2] possession of marijuana as a Class A misdemeanor,[3] and possession of paraphernalia as a Class A misdemeanor.[4] Strong has not demonstrated he was prejudiced when he appeared before the jury in shackles. The trial court did not abuse its discretion in admitting the marijuana cigarette found in the van Strong was driving because the warrantless search was permitted under the automobile exception to the Fourth Amendment. The State presented sufficient evidence Strong intended to use the rolling papers to smoke marijuana. Strong's three-year sentence for OWI with a prior OWI was appropriate in light of his character and the nature of his offense.

Accordingly, we affirm.

FACTS AND PROCEDURAL HISTORY

On July 3, 2005, at about 4 a.m., Strong and Denise Randolph were on U.S. 50 near Lawrenceburg. Strong was driving Randolph's van. Dearborn County Sheriff's Deputy James Kimmich, who was traveling in the opposite direction, noticed Strong was driving very slowly[5] in the left lane. Deputy Kimmich made a U-turn to investigate. Before Deputy Kimmich could activate his emergency lights to stop Strong, Strong

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[1] Ind. Code § 9-30-5-3.
[2] Ind. Code § 9-24-19-2.
[3] Ind. Code § 35-48-4-11.
[4] Ind. Code § 35-48-4-8.3.
[5] Although the speed limit in the area was 45 miles per hour, Deputy Kimmich determined Strong was driving 20 miles per hour.

crossed two lanes of traffic without signaling and stopped on the right shoulder of the road. Strong got out of the van. Deputy Kimmich got out of his vehicle and met Strong at the back bumper of the van.

Deputy Kimmich noticed a "strong odor of an alcoholic beverage" on Strong's breath, (Tr. at 82), a "repetitive speech pattern," (*id.*), and slurred speech. Deputy Kimmich asked Strong how much he had to drink that night and Strong replied he "had been drinking since he left Indianapolis." (*Id.* at 83.) When Deputy Kimmich asked for Strong's driver's license, Strong said his license was suspended. Strong admitted he had been driving. Deputy Kimmich administered three standardized field sobriety tests and Strong failed each. After being informed of the implied consent law, Strong agreed to take a chemical test.

Deputy Kimmich placed Strong in handcuffs for the ride to the police station. Strong then asked Deputy Kimmich to give Randolph the money in Strong's right front pants pocket. Deputy Kimmich found a pack of rolling papers folded inside the money. Deputy Kimmich asked Strong where his marijuana was. After initially denying he had marijuana, Strong admitted "there was a small amount of marijuana in the vehicle." (*Id.* at 99.) Officers found a marijuana cigarette in the passenger door of the van and Strong admitted it was his.

Deputy Kimmich took Strong to administer a chemical test. At that time, Strong refused. He was subsequently placed under arrest and charged with OWI with a prior conviction, operating while suspended, possession of marijuana, and possession of paraphernalia.

A bifurcated trial was held on March 14, 2006. The jury found Strong guilty of all charges. The trial court sentenced Strong to three years with two years suspended on the felony OWI count and to one year for each of the remaining misdemeanor counts. The court ordered the sentences served concurrently.

DISCUSSION AND DECISION

Strong asserts his right to appear before the jury free of physical restraints was violated, the marijuana cigarette found in the van was the product of an illegal search, the evidence was insufficient to support his conviction of possession of paraphernalia, and his three-year sentence was inappropriate in light of his character and his offense.

1. Shackles

At Strong's request, the trial court ordered the sheriff to "present [Strong] in Court for said trial without bonds or shackles and in street clothes (non-jail issue uniform)." (App. at 83.) At the beginning of the trial, outside the presence of the jury, the trial court noted "the motion for [Strong] to appear in non-jail uniform has been satisfied[.]" (Tr. at 6.) There was no mention of whether Strong was wearing shackles at that time.

After the presentation of the State's case-in-chief, Strong and Randolph testified for the defense. Following Randolph's testimony, the State requested a bench conference.

> THE STATE: I'm not sure how we can fix this but ...
> THE COURT: I know, I forgot completely.
> THE STATE: The Jurors are staring at him and I don't want the implication that he's got some [indiscernible] because he's got a bone problem or something. I don't know if there's anything that we can do. They can be instructed that he is in [inaudible].

THE COURT: I can't do that. It's my mistake, but I … we just get into these situations where I completely forgot about … he was in that situation until I saw him stand up.
THE STATE: O.K.
THE COURT: No, I can't.
THE STATE: If I call a rebuttal witness, who worked at the jail, would that be … can I ask him if leg restraints are used in court proceedings, not specifically [indiscernible].
THE COURT: No.
THE STATE: No.

(*Id.* at 190-91.) The State then called Deputy Kimmich as a rebuttal witness on other matters. At the conclusion of the cross-examination, the following discussion took place at the bench.

THE COURT: Will counsel approach please? I think there's one way that we could correct the error that the Court made in allowing him to step down and visibly show the limp. That would be just to ask the officer if he had a visible limp or leg injury on the night that he exhibited [sic]. I don't … because I think it would [indiscernible] either way here. [Inaudible] I think it could be working against the defense as well, wondering why you didn't bring it up. They have these questions in their mind.
THE STATE: That's what I was going to do on closing.
THE COURT: So, I think if you just ask the question, did he have a physical limp or leg injury on July 3, 2005. The answer's no, and just leave it as that.
THE STATE: I'll ask him.
THE COURT: Yes.

(*Id.* at 197.) Deputy Kimmich then testified he did not "note any physical disability on the part of [Strong]," (*id.* at 198), and Strong did not tell him of any physical disability when Strong took the field sobriety tests.

A defendant has the right to appear in front of a jury without physical restraints, unless such restraints are necessary to prevent the defendant's escape, to protect those

present in the courtroom, or to maintain order during trial. *Wrinkles v. State*, 749 N.E.2d 1179, 1193 (Ind. 2001), *cert. denied* 535 U.S. 1019 (2002). The trial court's order indicates restraints were not necessary, and the trial court's comments suggest the restraints were inadvertently left on Strong for some portion of the trial. Strong acknowledges in his brief the "trial court mistakenly allowed it to happen." (Appellant's Br. at 7.)

Strong did not object or draw the court's attention to the restraints. Generally, the failure to object at trial results in waiver of the issue on appeal. *Bruno v. State*, 774 N.E.2d 880, 883 (Ind. 2002), *reh'g denied*. Strong argues an objection was not required because the "purpose of objecting at trial is to make the court aware of a potential error in time to avoid the error or take corrective action," (Appellant's Reply Br. at 2), and the trial court had already been made aware of the error by the State.[6] Strong also asserts: "Only the jurors themselves could provide evidence as to what they perceived and as to how their perceptions affected their ability to be impartial. The trial court, however, did not question them. Accordingly, Mr. Strong's rights to due process were violated and a new trial is required." (*Id.* at 3-4.)

The State brought the matter to the trial court's attention initially, but Strong did not object to the trial court's proposed solution or ask the trial court to question each member of the jury about the shackles. The record indicates Strong's counsel was present for both bench conferences but did not object or comment. When the trial court

[6] In support, Strong cites *Purifoy v. State*, 821 N.E.2d 409 (Ind. Ct. App. 2005), *trans. denied* 831 N.E.2d 741 (Ind. 2005). There, we observed the purpose of the contemporaneous objection rule is "so that harmful error may be avoided or corrected and a fair and proper verdict will be secured." *Id.* at 412.

did not offer *sua sponte* to question jurors about the restraints, Strong did not ask the trial court do so. Consequently, Strong waived this issue. *Bruno*, 774 N.E.2d at 883.

We will review an issue that was waived at trial, however, if we find fundamental error. *Id.* To show the error was fundamental, a defendant must prove the error was "so prejudicial as to make a fair trial impossible." *Id.* Strong has not met this burden.

Strong was wearing shackles when he testified. However, it is not clear from the record whether the shackles were visible to the jury at any time. The discussion at the bench focused on the limp the jurors saw when Strong stepped down after testifying. The trial court appears to have declined to instruct the jury Strong was in shackles or to allow testimony that "leg restraints are used in court proceedings." (Tr. at 191.) Rather, the court's solution involved dispelling the impression Strong had a limp when he was given the field sobriety tests. Because Strong has not demonstrated he was prejudiced, this allegation of error must fail.

2. Search

Strong challenges the admission of the marijuana cigarette into evidence. At trial, Strong objected to the marijuana on chain of custody grounds. On appeal, however, he argues the evidence was the product of an illegal search. A party may not object on one ground at trial and raise a different ground on appeal. *White v. State*, 772 N.E.2d 408, 411 (Ind. 2002). This issue is therefore waived. *Id.*

Waiver notwithstanding, the search of the van was proper. The Fourth Amendment to the United States Constitution protects against unreasonable searches and seizures. When a search is conducted without a warrant, the State must prove an

exception to the warrant requirement existed at the time of the search. *Id.* One exception to the warrant requirement arises where an officer has probable cause to believe a vehicle contains contraband or evidence of a crime. *Cheatham v. State*, 819 N.E.2d 71, 74 (Ind. Ct. App. 2004). "Probable cause exists where the facts and circumstances would lead a reasonably prudent person to conclude that a search of the premises will uncover evidence of a crime." *Id.* In addition, the vehicle must be readily movable or capable of being driven when first seized. *Id.* at 75.

Deputy Kimmich had probable cause to search the van because the van was readily mobile and Strong admitted there was a small amount of marijuana in it. Accordingly, the search fell within the automobile exception to the Fourth Amendment warrant requirement and was permissible.[7] *See id.* at 76.

3. Sufficiency

In reviewing sufficiency of the evidence, we will affirm a conviction if, considering only the probative evidence and reasonable inferences supporting the verdict and without weighing evidence or assessing witness credibility, a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. *Hawkins v. State*, 794 N.E.2d 1158, 1164 (Ind. Ct. App. 2003).

To convict Strong of possession of paraphernalia, the State was required to prove Strong possessed "an instrument, a device, or other object that [he] intend[ed] to use for . . . introducing into [his] body a controlled substance." Ind. Code § 35-48-4-8.3.

[7] Deputy Kimmich testified he received consent from someone to search the van, but could not remember whether it was from Strong or Randolph. Because the search was permissible under the automobile exception, we need not address whether consent was given.

Strong argues the State failed to prove beyond a reasonable doubt he intended to use the rolling papers in his pocket to introduce marijuana into his body. He correctly notes intent may not be inferred "merely from proof that the instruments possessed were normally used or adapted for use with illegal drugs." *McConnell v. State*, 540 N.E.2d 100, 102 (Ind. Ct. App. 1989).

However, the State did more than merely explain the connection between rolling papers and marijuana.[8] Deputy Kimmich asked Strong where his marijuana was.

> [Strong's] initial response was, you know, he didn't have any and again, it comes down to when we talk to people, I just … I ask the same questions over and over to see if they are going to change their answer. And at that point I told Mr. Strong, look nobody drives around with a pack of rolling papers and no marijuana to smoke it with. It's just not normal. And at that point, he indicated that there was a small amount of marijuana in the vehicle.

(Tr. at 99.) Officers then searched the van and found a hand-rolled cigarette. The cigarette was tightly rolled,[9] gave off an odor of marijuana, and later tested positive for marijuana. Deputy Kimmich testified Strong "accepted responsibility and ownership" of the marijuana cigarette when asked about it. (*Id.* at 130.)

Strong possessed rolling papers that are commonly used in smoking marijuana. He also had a hand-rolled marijuana cigarette in the vehicle he was driving. A jury could reasonably conclude Strong intended to use the rolling papers to smoke marijuana.

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[8] Deputy Kimmich testified that rolling papers are commonly used in smoking marijuana and that marijuana and some form of paraphernalia are often found together.

[9] Deputy Kimmich testified a cigarette "rolled up that tight" was a "pretty good indication" the cigarette contained marijuana instead of tobacco. (Tr. at 101.)

4. Sentencing

"The Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Ind. Appellate Rule 7(B).

A Class D felony is punishable by a fixed term between six months and three years; the advisory sentence is eighteen months.[10] Ind. Code § 35-50-2-7. The trial court found three aggravators, listed no mitigators, and sentenced Strong to three years.[11] In doing so, the trial court stated:

> The advisory sentence would be a year and a half, and the Court is varying from the advisory sentence for three reasons. Number one being Defendant's criminal history which dates back to 1987; number two, this is his third felony conviction; and number three, he committed this offense while he was on probation for a similar offense of operating while intoxicated. . . . Court is imposing a jail sentence of 3 years with 2 years suspended, 365 days will be executed.

(Tr. at 255-56.)

Strong's character is demonstrated by his lengthy criminal history. Strong's criminal history includes five misdemeanor convictions: possession of marijuana in 1987; conversion, driving while suspended, and disorderly conduct, all in 1988; and OWI in 2003. Strong was convicted of felony robbery in 1988 and received a ten-year sentence. He was convicted of felony burglary and theft in 1989 and received sentences of twenty

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[10] Strong challenges only his sentence for OWI as a Class D felony.

[11] If a trial court relies on aggravating or mitigating circumstances to impose a sentence other than the advisory, it must: (1) identify all significant mitigating and aggravating circumstances; (2) state the specific reason why each circumstance is determined to be mitigating or aggravating; and (3) articulate the court's evaluation and balancing of the circumstances. *McMahon v. State*, 856 N.E.2d 743, 749-50 (Ind. Ct. App. 2006).

years and three years, respectively. Strong violated his probation on the OWI in 2004. In addition, he drove drunk while on probation for driving drunk, and he drove while his license was suspended after a previous conviction of the same offense. This continuing disregard for the law reflects poorly on his character.

Considering the nature of the offense, we note this conviction of OWI came while Strong was on probation for the same offense. He had a passenger in the vehicle. He drove at speeds substantially below the speed limit and cut across two traffic lanes without signaling, actions that could have resulted in injury to others.

Accordingly, we cannot say Strong's three-year sentence is inappropriate in light of his character and his offense.

CONCLUSION

Strong's rights were not prejudiced when he inadvertently appeared before the jury in shackles. The marijuana cigarette found in the van was properly admitted. The evidence was sufficient to convict Strong of possession of paraphernalia. Strong's three-year sentence for OWI with a prior OWI was appropriate in light of his character and his offense. Accordingly, we affirm.

Affirmed.

NAJAM, J., and MATHIAS, J., concur.